

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19~~10~~¹⁰

No. ~~874~~ 222

THE BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MARYLAND.

FILED MAY 14, 1909.

(21,670.)

(21,670.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 874.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

v.s.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MARYLAND.

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a THE UNITED STATES OF AMERICA,
District of Maryland, To-wit:

At a Circuit Court of the United States for the District of Maryland, begun and held at the Court-House, in the City of Baltimore, on the first Monday in November (being the second day of the same month), in the year of our Lord one thousand nine hundred and eight.

Present:

Hon. Nathan Goff, United States Circuit Judge;
Hon. Jeter C. Pritchard, United States Circuit Judge;
Hon. Thomas J. Morris, Judge of the Maryland District;
John C. Rose, Esq., Attorney;
John F. Langhammer, Esq., Marshal;
Arthur L. Spamer, Clerk.

Among other were the following proceedings, to wit:

In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
versus
INTERSTATE COMMERCE COMMISSION, Defendant.

1 *Bill of Complaint.*

Filed August 21, 1908.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
vs.
INTERSTATE COMMERCE COMMISSION, Defendant.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Maryland:

The Baltimore and Ohio Railroad Company, a corporation created by and existing under the laws of the State of Maryland, brings this its bill against the Interstate Commerce Commission, a body created and established by and existing under and by virtue of various Acts of the Congress of the United States. And thereupon your orator complains and says:

1. That it is a corporation duly organized and existing under the laws of the State of Maryland, having been incorporated by an Act of the General Assembly of that State, Chapter 123, Laws of 1826, and is possessed of all and every the corporate rights, privileges and franchises conferred by said Act and by divers other Acts sup-

plementary thereto and amendatory thereof. That its principal operating office is located in Baltimore in said State, within the limits of the District of Maryland.

2 2. That the Interstate Commerce Commission is a Commission created and established by and which now exists under and by virtue of an Act of the Congress of the United States, entitled "An Act to Regulate Commerce," approved February 4, 1887, and various other Acts amendatory thereof and supplementary thereto.

3. That your orator is engaged in the transportation of passengers and property by railroad from one state to another, and in respect of such transportation is therefore subject to the various Acts enacted by the Congress of the United States regulating and affecting interstate transportation of the character mentioned, in so far as these Acts are not repugnant to the Constitution of the United States and therefore invalid.

4. That by an Act of the Congress of the United States, approved March 4, 1907 (which by the terms thereof became effective March 4, 1908), entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon," it is provided that it shall be unlawful for any common carrier engaged in the transportation of passengers or property by railroad, *inter alia*, from one state of the United States to another, and for its officers and agents, to require or permit any employee actually engaged in or connected with the movement of any train to be or remain on duty for longer periods than prescribed by said Act, or to require or permit any employee when relieved from duty to again go on duty until he shall have been off duty for the period prescribed in and by said Act; and it is further provided by said Act that any carrier subject to its provisions and any officer or agent thereof who shall require or permit any employee to go, be or remain on duty in violation of the provisions of the Act shall be liable to a fine of not to exceed Five Hundred Dollars (\$500) for each and every violation thereof.

It is also by said Act made the duty of the Interstate Commerce Commission, the defendant herein, to execute and enforce the provisions of the same and to lodge with the proper district attorneys information of any violations thereof that may come to its knowledge, in order that suits may be brought to recover the penalties provided for by said Act. And it is therein further provided that all powers theretofore granted to the Interstate Commerce Commission shall be extended to it in the execution of the said Act.

5. That on the 3rd day of March, A. D. 1908, at a general session of the said Interstate Commerce Commission held at its office at Washington, D. C., on that day, an order was made and promulgated in the following form:

At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 3rd day of March, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

IN THE MATTER OF THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES OF RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907.

The method and form of monthly reports of hours of service of employees upon railroads subject to the Act of March 4, 1907, having been considered by the Commission:

It is ordered, That all carriers subject to the provisions of the act entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, report within thirty days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in said act.

It is further ordered, That the accompanying forms entitled "Interstate Commerce Commission Hours of Service Report," and the method embodied in the instructions therein set forth, be and the same are hereby adopted and prescribed; and all common carriers subject to said act are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of April, 1908.

And it is further ordered, That copies of said forms, together with a copy of this order, be served by registered mail upon all common carriers subject to said act.

A true copy.

12-193.

[SEAL.]

EDW. A. MOSELEY, *Secretary.*

The form of report called for by this order, as determined and settled by the said Interstate Commerce Commission, was as follows:

INTERSTATE COMMERCE COMMISSION HOURS OF
SERVICE REPORT.
Form of 1908.

.....
(Month and Year.)

Report No.

HOURS OF SERVICE REPORT
OF THE

.....
(Name of road.)

5

TO THE

INTERSTATE COMMERCE COMMISSION OF THE
UNITED STATES.

.....
(Name, title and address of officer sending this report.)

[Act of March 4, 1907.]

Oath.

STATE OF..... }
County of..... } ss:
Town of..... }

....., being duly
sworn, deposes and says that he is the.....
..... of the
Rail..... Company, and the official thereof to whom hours
of service of employees actually engaged in or connected with the
movement of trains is reported by its subordinate officers and agents;
and that annexed hereto, numbered..... is a sheet or sheets
constituting a full and true report, according to the best of his
knowledge, information, and belief, of all such hours of service and
following periods of rest of the aforesaid employees of said company
who were employed in excess of the statutory period or who had
not the statutory period of rest during the month of.....
190 , together with the causes of excess service or lack of rest and
the circumstances connected therewith and explanatory thereof, in
so far as required by the method and forms prescribed by the Inter-

6 state Commerce Commission pursuant to the Act of Congress
entitled "An Act to promote the safety of employees and
travelers upon railroads by limiting the hours of service of
employees thereon," approved March 4, 1907.

.....

Subscribed and Sworn to before me this.....
day of....., 190

.....

.....

The sheets to be annexed to the report above mentioned comprise five different forms, designated Form A to Form E, both inclusive, and upon these sheets the carrier making the report is required to show in detail the name, post-office address and occupation of each employee who was either on duty for a period of time in excess of that contemplated by the Act or who had not been off duty after any period of service for the length of time prescribed by the Act, and in the case of every such employee the carrier was required to state the cause of and the facts, if any, explanatory of the excess service thus rendered by the employee. The order thus made and promulgated by said Commission was thereafter duly served upon your orator.

That the said recited order was made and promulgated by the said Interstate Commerce Commission without an opportunity having been afforded to your orator and other carriers affected by it to be heard in respect of the lawfulness and propriety of the same, and although the said Commission was thereafter requested to accord a hearing at which the objections to the said order could be presented and considered, the request was denied.

7 6. Your orator avers and charges that the purpose of the said Interstate Commerce Commission in making said above recited order and in requiring the reports to be made pursuant to the terms thereof was to enable it to secure from carriers evidence of infractions of the law, in order that suits might thereupon be brought to recover the penalties consequent thereon as prescribed by the afore-said Act. Even if this were not the purpose of the order the result would nevertheless be the same, because of the provision of the said Act which makes it the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any violation which may come to its knowledge, and the further provision which makes it the duty of such district attorneys to bring suits, upon satisfactory information being lodged with them, to recover the penalties.

If, therefore, the said order be permitted to stand and your orator be required to make the report called for therein, it will, in the event of any infraction of the Act by its officers or agents, be obliged to

furnish under oath information of such infraction or violation, and will, consequently, be required not only to disclose actions of its officers or agents which will subject them to the penalties prescribed by the Act, but will also subject it to like penalties because of the provision contained in the Act that in all prosecutions thereunder the carrier shall be deemed to have had full knowledge of all acts of all its officers and agents.

The enforcement of said order, therefore, will result in your orator being compelled to furnish evidence which could be used to establish infractions of the said Act, and consequently to subject it to the penalties prescribed, and would, therefore, violate and ignore the rights guaranteed to your orator by the Fourth and Fifth Amendments to the Constitution of the United States.

7. Your orator further avers that the said order necessarily contemplates and requires that infractions of the law which may occur—and it is inevitable that through oversight, inadvertence or mistake such infractions will occur—shall be made the subject of report to your orator by the officers concerned in or responsible for such infractions, which said reports will become part of the records of your orator, and as such will be open to the inspection of the said Interstate Commerce Commission. The inevitable and necessary result, therefore, of the enforcement of the said order will be that officers of your orators will be required to report in writing infractions or violations of the law, which said reports will be open to the inspection of the said Commission, whose duty it will be to cause the said reports to be delivered to the United States District Attorney empowered to act in the matter, in order that the same may be used by him in securing the conviction of the officer making them, of a violation of the said Act, and the consequent infliction upon such officer of the penalties prescribed thereby. The enforcement, therefore, of the said order will have the necessary effect of requiring the officers of your orator to make reports which will be evidence sufficient to convict them of violations of the Act, and consequently to subject them to the penalties prescribed therein, a result which is opposed to and violative of the rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

8. Your orator further avers and charges that neither by the said Act of March 4, 1907, above referred to, nor by any other Act of the Congress of the United States, has the said Interstate Commerce Commission been vested with authority or power to require the making by your orator and other carriers of reports of the character called for, and that as a consequence of such want of power and authority the said order of the Commission is not a lawful one.

8½ 9. Your orator further avers that compliance with the order here complained of would necessarily result in imposing upon your orator new and added burdens both in labor and expense in that the proper making, gathering, tabulating and compiling of the information required to be set forth in and by the reports required in and by said order will necessitate the employment of a special force of clerks and the organizing them into a special de-

partment or bureau for that purpose, and in the event of said order ultimately and in a proceeding arising in ordinary course being declared to be invalid, as it is here asserted by your orator to be, your orator will have been deprived in the above aspect, of property without due process of law; and pending such ultimate determination as to the legality of said order your orator will be subject to the harassments incident to a multiplicity of suits which may be and your orator believes and asserts will be brought against it by the defendant Interstate Commerce Commission or the various district attorneys of the United States having duties to perform in the various judicial districts through which the lines of your orators run and in which it maintains offices and agents, to collect the fines and penalties prescribed in and by said Act of March 4, 1907, aforesaid, and the other acts "to regulate commerce" therein referred:

Wherefore your orator has not and will not hereafter have in such regard and connection, any complete, full or adequate remedy at law, by or under which it may have redress for its manifold grievances in such regard.

9 Wherefore, your orator prays:

That, pending the final determination of the case, an order be made amending the order of March 3, 1908, of the said Interstate Commerce Commission, and enjoining any proceedings thereunder.

That upon the final hearing of the case an order be made setting aside and annulling the said order of the said Interstate Commerce Commission, and perpetually enjoining any action or proceedings thereunder, and that your orator may have such other and further relief in the premises as the nature and circumstances of the case may require.

To the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may full, true, direct, and perfect answer make, according to the best of the knowledge, remembrance, information and belief of the proper members of the said defendant Commission, but not under oath (answer under oath being hereby expressly waived), to the several matters herein charged, as fully and particularly as if the same were here repeated and the defendant especially interrogated as to each and every of such matters:

May it please your Honors to grant unto your orator a writ of *subpœna ad respondendum*, issuing out of and under the seal of this Honorable Court directed to the said defendant, the Interstate Commerce Commission, commanding it, by a certain day and under a certain penalty, to be and appear in this Honorable Court, then and there to answer to the premises and to stand to and abide by such order and decree as may be made against it. And your orator will ever pray.

THE BALTIMORE AND OHIO RAILROAD
COMPANY.

By G. L. POTTER, *Third Vice-President*.

H. L. BOND, JR.,

Solicitor for Complainant.

10 STATE OF MARYLAND,
Baltimore City, To wit:

This day personally appeared before me, the undersigned, G. L. Potter, who, being by me first duly sworn, deposes and says that he is the Third Vice-President of The Baltimore and Ohio Railroad Company, the complainant named in the above written complaint; that he has read the said complaint; and that the same is true of his own knowledge, except such matters as are therein stated on information and belief, and that as to such statements he believes it to be true.

G. L. POTTER.

Subscribed and sworn to before me, this twentieth day of August, 1908.

[NOTARIAL SEAL.]

GEO. W. HAULENBECK,
Notary Public.

11 *Subpœna.*

Issued August 21st, 1908.

THE UNITED STATES OF AMERICA,
District of Maryland, To wit:

To Interstate Commerce Commission, Greeting:

[The Seal of the Circuit Court, Maryland.]

You are hereby commanded that all excuses and delays set aside you be and appear at the Clerk's office of the Circuit Court of the United States for the Fourth Circuit in and for the District of Maryland on the first Monday in October next, to answer unto the bill of complaint of The Baltimore and Ohio Railroad Company, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of August in the Year of Our Lord, 1908.

Issued twenty-first day of August, 1908.

ARTHUR L. SPAMER, *Clerk.*

MEMORANDUM.—The defendant is required to enter its appearance in the suit in the Clerk's Office on or before the first Monday of October next; otherwise the Bill may be taken *pro confesso*.

Marshal's Return.

"Served copy of within Subpœna and copy of the bill of complaint in this cause on Interstate Commerce Commission by service on Wm. H. Connolly, Chief Clerk of said Commission, Aug. 22, 1908.

AULICK PALMER, *Marshal.*"

12 *Appearance of John C. Rose, Esq., for Defendant.*

Filed September 9th, 1908.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY

vs.

INTERSTATE COMMERCE COMMISSION.

Mr. CLERK:

Please enter my appearance in the above entitled case for the Interstate Commerce Commission.

JOHN C. ROSE,
Sol. for Defendant.

13 *Demurrer to Bill of Complaint.*

Filed September 28, 1908.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer.

14 In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the District of Maryland:

Demurrer of the Above-named Defendant, the Interstate Commerce Commission, to the Bill of Complaint, of the Above-named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill.

And for cause of demurrer shows:

That it appears by the complainant's own showing by the said

bill that it is not entitled to the relief prayed by said bill against this defendant;

That said bill prays for relief from the consequences of future violations of the law;

That said bill prays for relief of employees or officials of complainant corporation not named and not parties to the bill;

That the complainant corporation is not entitled to the protection of Article V of the Amendment to the Constitution of the
15 United States, as prayed for in said bill;

That the order of the defendant against which relief is sought in complainant's bill is not an unreasonable search or seizure, and is not otherwise a violation of the provisions of Article IV of the Amendments to the Constitution of the United States; and

That the order of the defendant is a lawful exercise of power lawfully conferred.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurs thereto; and it prays the judgment of this honorable Court whether it shall be compelled to make further or any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in its behalf sustained.

JOHN C. ROSE,

U. S. Attorney, Solicitor for Defendant.

PHILIP J. DOHERTY,

Solicitor and of Counsel for Defendant.

DISTRICT OF COLUMBIA,

City of Washington, ss:

Edward A. Moseley makes solemn oath and says that he is Secretary of the above-named defendant, the Interstate Commerce Commission, and that the foregoing demurrer is not interposed for delay.

EDWARD A. MOSELEY.

Subscribed and sworn to before me this Twenty-fourth day of September, 1908.

[SEAL OF NOTARY.]

H. S. MILSTEAD,

Notary Public.

16 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN C. ROSE,

U. S. Attorney, Solicitor for Defendant

PHILIP J. DOHERTY,

Solicitor and of Counsel for Defendant.

- 17 *Certificate as to Importance of Suit and Request for its Expedition, Together with an Order to Furnish Divers Copies.*

Filed October 2nd, 1908.

BALTIMORE AND OHIO RAILROAD COMPANY

v.

THE INTERSTATE COMMERCE COMMISSION.

To the Clerk of the Court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Baltimore and Ohio Railroad Company against the Interstate Commerce Commission, under the act of Congress entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903; and in further compliance with the provisions contained in Section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Fourth Circuit, to the end that said case shall be given precedence over other cases in said Court, and be assigned for hearing at the earliest practicable date before not less than three Judges, as is provided by the said Act of February 11, 1903.

CHARLES J. BONAPARTE,

Attorney General.

Washington, D. C., September 29, 1908.

- 18 *Order of Court Setting Case for Hearing.*

Filed October 16th, 1908.

United States Circuit Court, District of Maryland.

No. 59, Equity Docket F.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE INTERSTATE COMMERCE COMMISSION.

In accordance with the provisions of the Act of Congress approved February 11, 1903, an Act to expedite the hearing of cer-

tain suits in equity, Vol. 32, Stat. at Large, part 1, page 823, it is hereby ordered that Hon. Thomas J. Morris, United States District Judge for the District of Maryland, be and he hereby is designated to sit with the two Circuit Judges of the Fourth Circuit on the hearing and disposition of this case, which hearing is hereby set for Tuesday, November 17, 1908, at Richmond, Virginia, at two o'clock p. m., of said day.

NATHAN GOFF,
U. S. Circuit Judge.

October 16th, 1908.

19 *Appearance of F. D. McKenney, Esq., for Complainant.*

Filed October 28th, 1908.

In the Circuit Court of the United States for the District of Maryland.

In Equity. Doc. No. —.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,
vs.
INTERSTATE COMMERCE COMMISSION, Defendant.

Præcipe for Appearance.

The Clerk will please enter my appearance on behalf of the complainant in the above cause.

F. D. MCKENNEY,
Hibbs Building, Washington, D. C.

20 *Stipulation by and Between the Attorney General and Counsel for Baltimore and Ohio Railroad Company, &c.*

Filed December 7th, 1908.

In the Circuit Court of the United States for the District of Maryland. In Equity.

BALTIMORE & OHIO RAILROAD COMPANY
v.
INTERSTATE COMMERCE COMMISSION.

It is hereby agreed and stipulated by and between the Attorney General of the United States and counsel for the Baltimore & Ohio Railroad Company, and also the complainants in the various pending cases hereinafter specified, that subsequent to the 3rd day of March, A. D. 1908, that is to say, on the 15th day of August, A. D.

1908, the annexed circular letter and accompanying instructions, particular attention being called to paragraph 4 of the instructions, which reads as follows:

Reports and records of hours of service of employees subject to the act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," should be made to the Secretary or similar officer of the reporting common carrier, who shall make the report called for under the order of the Commission of date of March 3, 1908.

were issued by the Interstate Commerce Commission and copy thereof was mailed to and received by said parties complainants.

It is further stipulated that for the purpose of obtaining at an early date the opinion and judgment of the Supreme Court of the United States upon the questions presented by the record in this cause, said record shall be and remain as at present with the addition of this stipulation, that is to say, if the demurrer heretofore interposed herein shall be sustained by the Circuit

21 Court for the District of Maryland a final decree dismissing the complainant's bill may be passed at once by said court, and from such decree complainant shall forthwith appeal to the Supreme Court of the United States.

If said demurrer shall be overruled by said court then said defendant will and hereby agrees to abide by its said demurrer and will submit to the immediate entry of a final decree against it, from which decree it will forthwith prosecute its appeal to the Supreme Court of the United States.

It is further agreed and stipulated that pending the final disposition of the above cause by the Supreme Court of the United States the following causes, in all of which the Interstate Commerce Commission is defendant:

Pennsylvania Railroad Company, Philadelphia & Reading Railway Company, and Lehigh Valley Railroad Company, in the Eastern District of Pennsylvania;

New York Central & Hudson River Railroad Company, Erie Railroad Company, Delaware, Lackawanna & Western Railroad Company, and New York, Ontario & Western Railroad Company, in the Southern District of New York;

New York, New Haven & Hartford Railroad Company, in the District of Connecticut;

Central Railroad of New Jersey, in the District of New Jersey;

Boston & Maine Railroad Company, in the District of Massachusetts;

shall remain *in statu quo* and shall abide the final disposition of the above entitled cause, it being further agreed and stipulated that pending such final disposition of this cause the above named carriers shall not be required to make the reports required by the orders here in question, and that at no time shall they be required to defend

any prosecution on account of any omissions to make such reports during the period anterior to such final disposition.

Nov'r 17th, 1908.

FREDERIC D. McKENNEY,
Solicitor for Complainant Baltimore & Ohio Railroad Co.

CHARLES J. BONAPARTE,
Attorney General of United States.

22

JOHN G. JOHNSON,
*Solicitor for Other Complainants
Than Baltimore & Ohio R. R. Co.*

23

Interstate Commerce Commission,
Office of the Secretary,
Washington.
Edward A. Moseley, Secretary.

AUGUST 15, 1908.

DEAR SIR: From and after September 1, 1908, all blanks, except "Form A," will cease to be accepted as correct forms on which to make monthly excess service reports, and should be destroyed. In place thereof, this office will furnish (for the present), *upon application*, new forms "B," "C," "D," and "E," together with two new oaths, known as oath "A" and oath "B."

Oath "A" should be used with forms "A," "B," "C," "D," and "E" attached, when there is any excess service to be reported under the headings contained on those forms. Oath "B" should be used when there are no forms attached, there having been no excess service during the month reported.

You will please note subdivision 4 of the new letter of instructions, which requires the report to be made by the secretary of the reporting common carrier, or by some similar officer.

You will observe that the numbering of the forms and oaths has been discontinued, the name of the month for which the report is made being deemed sufficient.

Very respectfully,

EDW. A. MOSELEY, *Secretary.*

24

Interstate Commerce Commission.

Hours of Service Reports.

(Form of 1908.)

Instructions to be Followed in Filling up the Blanks.

1. A verified report, in accordance with the method and forms prescribed, must be sent to the Interstate Commerce Commission each month, showing any employee on duty in excess of the period,

or on duty without the period off duty, prescribed by the act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907. In case no employee has been employed in excess of the time named in said act, and in case no employee has gone on duty with less than the statutory period off duty, oath "B," properly filled out and attested by a notary public (or other public officer clothed with authority to perform his legal functions), will be accepted in lieu of the forms A, B, C, D, and E.

2. In case of excess service, or of instances where employees have returned to duty in less than the statutory period off duty, the proper form is to be filled out and oath "A" to accompany the sheet or sheets used. To provide for the retention of duplicates the forms are printed in copying ink.

3. In case one sheet does not afford sufficient space to give the names of all employees, additional sheets should be used of the particular form and these sheets numbered consecutively.

4. Reports and records of hours of service of employees subject to the act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," should be made to the secretary or similar officer of the reporting common carrier, who shall make the report called for under the order of the Commission of date of March 3, 1908.

5. These blanks must be fully filled out as to each appropriate column.

6. Each monthly report shall be filed not later than 30 days after the last day of the month to which such report relates.

7. The following abbreviations for occupations may be used: Con. (conductor); engr. (engineer); frmn. (fireman); trn. (trainman—brakeman or flagman); swm. (switchman); opr. (operator); tr. d. (train dispatcher); tow. (towerman).

For the present such blank forms as are necessary to comply with this order will be furnished upon request.

25

Decree of Court.

Filed March 12th, 1909.

In the Circuit Court of the United States for the District of Maryland.

No. 59, Equity Docket F.

BALTIMORE & OHIO RAILROAD COMPANY

versus

INTERSTATE COMMERCE COMMISSION.

This cause came on this day to be heard, on consideration whereof it is adjudged that the injunction asked for by the complainant be refused, and it is further decreed that the demurrer filed by the defendant herein be sustained, and the court directs, in accordance

with the terms of the stipulation agreed to by the parties hereto filed in this cause December 7, 1908, that complainant's bill be and the same is hereby dismissed, defendant to recover its costs to be taxed by the Clerk.

March 12th, 1909.

NATHAN GOFF,
Circuit Judge, Presiding.

26 *Complainant's Appeal and Assignment of Errors and Order of Court Allowing Appeal.*

Filed April 7th, 1909.

In the Circuit Court of the United States for the District of Maryland. In Equity.

Docket "F," No. 59.

BALTIMORE & OHIO RAILROAD COMPANY, Complainant,
vs.
INTERSTATE COMMERCE COMMISSION.

Appeal.

Now comes the Baltimore & Ohio Railroad Company, complainant above-named, by Frederic D. McKenney, its Solicitor of record, and as authorized in and by the Act of Congress approved June 29, 1906, entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' " etc., (34 Statutes at Large, p. 584, ch. 3591), appeals to the Supreme Court of the United States from the final decree passed and entered in the above cause on the 12th day of March A. D. 1909.

BALTIMORE & OHIO RAILROAD
COMPANY,

By F. D. McKENNEY,

Its Solicitor of Record.

27

Assignments of Error.

(1) The Honorable the Circuit Court of the United States erred;
(a) In not overruling the demurrer interposed by the Interstate Commerce Commission to complainant's bill of complaint.

(b) In refusing to extend and grant to the complainant Baltimore & Ohio Railroad Company the relief prayed in its said bill of complaint.

(c) In dismissing said bill of complaint at complainant's costs.

F. D. McKENNEY,
Solicitor of Record for Complainant.

HUGH L. BOND,
Of Counsel.

Appeal allowed.

NATHAN GOFF,
Circuit Judge.

28

Complainant's Appeal Bond.

Filed April 7th, 1909.

Know all men by these presents, That we, the Baltimore & Ohio Railroad Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the Interstate Commerce Commission, in the full and just sum of Two Hundred (200.00) dollars, to be paid to the said Interstate Commerce Commission, or their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this Fifth day of April, in the year of our Lord one thousand nine hundred and Nine.

Whereas, lately at a Circuit Court of the United States for the District of Maryland, in a suit depending in said Court, between the Baltimore & Ohio Railroad Company and the Interstate Commerce Commission a decree was rendered against the said Baltimore & Ohio Railroad Company and the said Baltimore — Railroad Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Interstate Commerce Commission citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said Baltimore & Ohio Railroad Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

BALTIMORE & OHIO RAILROAD
COMPANY,
By FREDERIC D. McKENNEY, [SEAL.]
Its Attorney.

Sealed and delivered in the presence of—
— — —

29 [CORPORATE SEAL.] AMERICAN SURETY COMPANY
OF NEW YORK,
By H. E. WESCOTT,
Resident Vice-President.

Attest:

CLAUDE B. BROWN,
Resident Ass't Sec'y.

Approved by—
NATHAN GOFF,
Circuit Judge.

30 UNITED STATES OF AMERICA, ss:

To Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal from a decree of the Circuit Court of the United States for the District of Maryland in your favor passed in a cause in said court wherein the Baltimore and Ohio Railroad Company is complainant and you are defendant to show cause, if any there be, why the decree rendered against the said complainant in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Nathan Goff, Judge of the said Circuit Court of the United States for the District of Maryland, this seventh day of April, in the year of our Lord one thousand nine hundred and nine.

NATHAN GOFF,
Circuit Judge Presiding.

Attest:

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER,
Clerk U. S. Circuit Court for the District of Maryland.

30½ Service of the within citation acknowledged this 10 day of April 1909.

JOHN C. ROSE,
Att'y for Respondent.

31 *Order to Transmit Record.*

And thereupon, it is ordered by the Court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Maryland, To wit:

I, Arthur L. Spamer, Clerk of the Circuit Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said Circuit Court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court, this 5th day of May, 1909.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

Endorsed on cover: File No. 21,670. Maryland C. C. U. S. Term No. 874. The Baltimore & Ohio Railroad Company, appellant, *vs.* Interstate Commerce Commission. Filed May 14th, 1909. File No. 21,670.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

BALTIMORE AND OHIO RAILROAD COM-	}	No. 874.
pany, appellant,		
v.		
INTERSTATE COMMERCE COMMISSION.	}	

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MARYLAND.*

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the appellee in the above-entitled cause, respectfully moves the court to advance the same on the docket for hearing on a day convenient to the court during the next term, for the following reasons:

First. The cause is a proceeding in equity under section 16 of the act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, brought by the appellant in the Circuit Court of the United States for the District of Maryland, to enjoin the enforcement of an order of the appellee made under and by virtue of the provisions of said act.

Second. On March 3, 1908, the Interstate Commerce Commission made an order requiring all common carriers engaged in interstate commerce in the United States, of which the appellant is one, to report on the first day of each calendar month the names of all employees engaged in interstate commerce subject to the act of March 4, 1907 (34 Stats., 1415), entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," commonly called the "Hours of Service Act," who had been employed during the preceding month in excess of the statutory period, with the circumstances surrounding such employment. On August 20, 1908, the Baltimore and Ohio Railroad Company filed a bill of complaint against the Interstate Commerce Commission praying the court to enjoin the enforcement of said order. To this bill of complaint the Interstate Commerce Commission filed its demurrer. The court unanimously sustained the demurrer of the Commission and dismissed the bill. From that decree the appellant appeals directly to the Supreme Court in accordance with the provisions of section 16 of the act to regulate commerce as amended. In the bill of complaint it is charged that the order of the commission is not authorized by law and deprives the appellant of its constitutional rights.

Third. The speedy determination of the lawfulness of the Commission's order requiring reports of all employees on duty in excess of the statutory period

is a matter of great public importance. The Commission believes that its order is greatly in the interest of the public safety, in that it has a strong deterrent effect upon the carriers in employing over-worked and worn-out servants.

Fourth. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity," and so forth, approved February 11, 1903, applicable to all such suits, and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

I am authorized to state that counsel for the appellant concurs in this motion.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1909.

O



JAN 3 1911
JAMES H. HENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 222.

THE BALTIMORE & OHIO RAILROAD COMPANY,
APPELLANT,

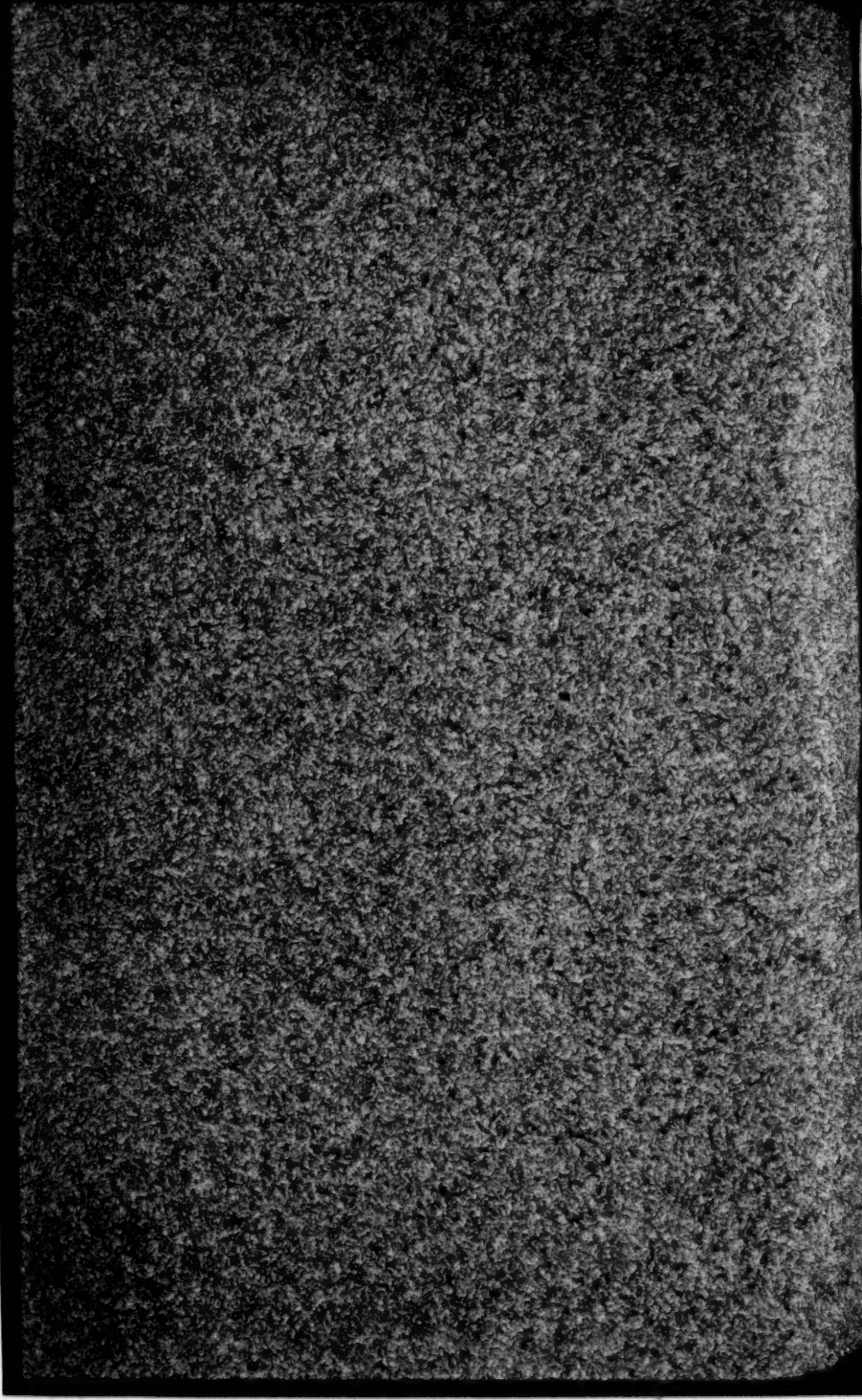
vs.

INTERSTATE COMMERCE COMMISSION.

**ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MARYLAND.**

MOTION TO FIX DAY FOR ARGUMENT.

JOHN G. JOHNSON,
FREDERIC D. MCKENNEY,
Solicitors for Appellant.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 222.

**THE BALTIMORE & OHIO RAILROAD COMPANY,
APPELLANT,**

vs.

INTERSTATE COMMERCE COMMISSION.

**ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MARYLAND.**

MOTION TO FIX DAY FOR ARGUMENT.

Now comes The Baltimore & Ohio Railroad Company, appellant above named, by its attorneys of record, John G. Johnson and Frederic D. McKenney, Esquires, and represents to this honorable court that the above case was argued and submitted to this honorable court for decision at the October, 1909, term thereof; and subsequently was restored to the docket for argument "before a full bench."

The issues involved arise under an act of Congress entitled "to promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon" (34 Stats., 1415, ch. 2939), commonly

called the "Federal Hours of Service Law," and are of general public importance. Many cases involving the construction and application of the terms of said act are pending in the various judicial circuits, awaiting the disposition by this honorable court of the above-entitled case.

In view of the status of the docket of this honorable court and of the lists of cases heretofore especially assigned for argument during the month of January current, it is respectfully suggested that if it meets with the views and convenience of the court, the above case be assigned for argument on or about Monday, the 20th day of February next.

JOHN G. JOHNSON,
FREDERIC D. McKENNEY,
*Solicitors for Baltimore & Ohio Railroad
Company, Appellant.*

JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 456.

**THE BALTIMORE & OHIO RAILROAD COMPANY,
APPELLANT,**

INTERSTATE COMMERCE COMMISSION.

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.**

BRIEF FOR APPELLANT.

**JOHN G. JOHNSON,
FREDERIO D. MCKENNEY,**

For Appellant.

HUGH L. BOND,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 456.

THE BALTIMORE & OHIO RAILROAD COMPANY,
APPELLANT,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

BRIEF FOR APPELLANT.

The Act of Congress and the Orders of Interstate Commerce Commission Involved Herein, with Observations Thereon.

The Congress, by an act commonly called the "Federal Hours of Service Law," and entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, 11.50 a. m. (34 Stats. L., 1415, ch. 2939), provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Railroads.

Service hours of employees restricted.

Meaning of word "railroad."

Meaning of word "employees."

Sixteen hours the maximum continuous service of trainmen.

Ten consecutive hours off duty.

Service hours of telegraph and telephone operators.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided,* That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only dur-

ing the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Commission may extend period.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

Penalty for violation.

Prosecutions.

Unavoidable accidents, etc.

Wrecking, etc., crews.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

Enforcement.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Effective.

If the act be accepted as valid and within the legislative powers of the Congress, it will be noted that "employees"—being "persons actually engaged in or connected with the movement of any train"—of any interstate common carrier by railroad, or by bridges and ferries used or operated in connection with any railroad, and not being operators, train dispatchers, or others "who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements," are prohibited thereby from being either required or permitted to remain "on duty for a longer period than sixteen consecutive hours." Whenever any such employee "shall have been *continuously* on duty for sixteen hours" he must be relieved and neither required nor permitted to return again to duty "until he has had at least ten consecutive hours off." Any such employee who may not "have been *continuously* on duty for sixteen hours," but "who has been on duty sixteen hours in the aggregate in any twenty-four-hour period," is prohibited from being either "required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

Such "employees" as are also operators, train dispatchers, or who by use of the telegraph or telephone have to do with "orders pertaining to or affecting train movements," are prohibited from being either required or permitted to be or remain on duty "for a longer period than nine hours in any twenty-four-hour period" in towers and stations "continuously operated night and day," or for a longer period than thirteen hours "in towers and stations operated only during the daytime," except that in case of emergency "employees" of this class, whether employed in "continuously operated" or merely "daytime" towers or stations "may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week."

Any such common carrier or any officer or agent thereof

requiring or permitting violations of any of the above-mentioned provisions thereby become "liable to a penalty of not to exceed five hundred dollars for each and every violation."

It is made the duty of the appropriate United States district attorneys to bring suits to recover such penalties, and it is declared to be the duty of the Interstate Commerce Commission "to lodge with the proper district attorneys information of any such violations as may come to its knowledge."

It is likewise made the duty of the Interstate Commerce Commission "to execute and enforce the provisions of this act," and "all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

It is expressly declared by *provisos* artificially inserted in section 3, that the provisions of the act should not apply in any case of—

- (1) casualty, or
- (2) unavoidable accident, or
- (3) act of God, or
- (4) where the delay was the result of a cause not known to and which could not have been foreseen by the carrier, its officer or agent in charge of such employee at the time said employee left a terminal, nor
- (5) to the crews of wrecking or relief trains.

On March 3, 1908, at least one day before the date on which said act by its terms, section 5, took effect and became in force, the Interstate Commerce Commission, in the supposed discharge of the duty imposed upon it "to execute and enforce the provisions of this act," and in the exercise of all or some of the "powers granted to" said Commission and by "this act" "extended to it in the enforcement of this act," adopted and made an order, which was subsequently served upon common carriers of the class described in this act, including the complainant here, requiring "all carriers subject to the provisions of the act," to "report within thirty

days after the end of each month, under oath, *all instances where employees subject to said act have been on duty for a longer period than that provided in said act;*" such reports commencing with and for the month of April, 1908, to be made upon forms and in accord with a method prescribed in the instructions of the Interstate Commerce Commission accompanying said order (R., 3).

The prescribed form and method requires "the official" of the particular common carrier subject to the act and making the report, to state under oath that—

(1) he is the official thereof to whom hours of service of employees actually engaged in or connected with the movements of trains is reported by its subordinate officers and agents; and

(2) that the annexed sheets, to the best of his knowledge, information, and belief, constitute a full report "*of all such hours of service and following periods of rest of the aforesaid employees of said company, who were employed in excess of the statutory period or who had not the statutory period of rest for the month of —, 190—, together with the causes of excess service or lack of rest and the circumstances connected therewith and explanatory thereof, in so far as required by the method and forms prescribed by the Commission (R., 4).*

The prescribed method, as indicated by the blanks or sheets furnished by the Commission required the carrier making the report to *show in detail* the—

- (1) name,
- (2) post office address, and
- (3) occupation

of each employee who was either on duty for a period of time in excess of that contemplated by the act, or who had not enjoyed a period of rest equal to that prescribed by the act, *after any period of service*, and in every such case to state—

(4) the cause of and the facts, if any, explanatory of the excess service thus rendered by the employee (R., 5).

August 15, 1908, the Interstate Commerce Commission amended its form of report and accompanying oaths in connection with the supposed requirements of this act and issued and served upon interested carriers a circular letter and accompanying instructions, which, among other things, required the carriers to send to the Commission each month "a verified report, in accordance with the method and forms prescribed," not only in cases of excessive service or of instances "where employees have returned to duty in less than the statutory period off duty," but also in cases where "*no employee has been employed in excess of the time named in said act*" and in cases where "*no employee has gone on duty with less than the statutory period off duty.*"

Paragraph 4 of said instructions required reports and records of hours of service of employees subject to the act to be "made to the secretary or similar officer of the reporting common carrier, who shall make the report called for under the order of the Commission of date of March 3, 1908" (R., 13).

Oath (Form A) accompanying such instructions did not differ materially from the corresponding form theretofore issued by the Commission.

Oath (Form B) required the "secretary or similar officer" making the same to declare, according to his best knowledge, information, and belief, that "no instances of excess service were rendered by any employee actually engaged in or connected with the movements of trains," nor were there any employees who resumed duty without having had the statutory time off duty" during the preceding month.

The circular letters, instructions, and forms prescribed by the Commission and above referred to will be found reproduced in full in the APPENDIX to this brief.

These orders, instructions, and forms were made and promulgated by the Interstate Commerce Commission without an opportunity having been afforded to the carriers

affected by it to be heard in respect to the lawfulness and propriety of the same, and although the Commission was thereafter requested to accord a hearing at which the objections to the said order could be presented and considered, the request was denied (R., 5).

A considerable number of the interstate railroad companies, supposed to be within and affected by the provisions of the act of Congress aforesaid, refused to obey the instructions of the Interstate Commerce Commission to make the verified reports demanded and numerous suits by such companies were instituted against the Commission in various United States Circuit Courts, for example, by Pennsylvania Railroad Company, Philadelphia & Reading Railway Company, and Lehigh Valley Railroad Company, in the Eastern District of Pennsylvania;

New York Central & Hudson River R. R. Co., Erie Railroad Company, Delaware, Lackawanna & Western Railroad Company, and New York, Ontario & Western R. R. Co., in the Southern District of New York;

New York, New Haven & Hartford R. R. Co., in the District of Connecticut;

Central Railroad of New Jersey, in the District of New Jersey;

Boston & Maine R. R. Co., in the District of Massachusetts, and

Baltimore & Ohio Railroad Co., in the District of Maryland (R., 13).

Certificate of Expedition and Order of Court Thereon.

The Attorney General of the United States having filed with the clerk of the United States Circuit Court for the District of Maryland a certificate that in his opinion the case last above mentioned was a case of general importance (R., 11), the presiding circuit judge designated the Honorable

Thomas J. Morris, United States District Judge for Maryland, to sit with the two circuit judges, and the hearing of the case was expedited (R., 12).

Stipulation between the Attorney General and Counsel Representing Above-named Companies.

It was thereupon stipulated between counsel representing the various railroad companies above mentioned and the Attorney General of the United States "that for the purpose of obtaining at an early date the opinion and judgment of the Supreme Court of the United States upon the questions presented by the record" in the Baltimore and Ohio case, the record should remain as it would be found to be upon the filing of said stipulation therein; that if the demurrer of defendant to the bill of complaint should be sustained a final decree, without the necessity of any decree *nisi* intervening, should be entered, and that pending the final disposition of that case in this court, the various cases already instituted in other circuits should remain *in statu quo* and should abide the judgment in this case, it being further stipulated that pending the final disposition of this cause none of the carriers named in the stipulation should "be required to make the reports" demanded by the orders of the Commission here in question, and "that at no time" should said carriers "be required to defend any prosecution on account of any omissions to make such reports during the period anterior to such final disposition" (R., 13, 14).

Pleadings and Action of Circuit Court Thereon.

Complainant's bill of complaint, as amended by stipulation, filed herein, alleges that complainant is a corporation organized and existing under the laws of the State of Maryland, having its principal operating office in Baltimore, in said State, within the judicial district of Maryland; that

the defendant, Interstate Commerce Commission, was created and established as a Commission by and exists under an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and various other acts amendatory thereof and supplementary thereto; that complainant is engaged in the transportation of passengers and property by railroad from one State to another, and in respect to such transportation is subject to the various acts of Congress affecting interstate transportation of the character mentioned, in so far as these acts are not repugnant to the Constitution of the United States; that by an act of Congress entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, but by its own terms effective only on and after March 4, 1908, it is provided that it shall be unlawful for any common carrier engaged in the transportation of passengers or property by railroad, *inter alia*, from one State of the United States to another, and for its officers and agents to require or permit any employee actually engaged in or connected with the movement of any train to be or remain on duty for longer periods than prescribed by said act, or to require or permit any employee when relieved from duty to again go on duty until he shall have been off duty for the period prescribed in and by said act; and that any carrier subject to its provisions and any officer or agent thereof who shall require or permit any employee to go, be, or remain on duty in violation of the provisions of the act shall be liable to a fine of not to exceed five hundred dollars for each and every violation thereof; that it is also made the duty of the Interstate Commerce Commission to execute and enforce the provisions of said act, and to lodge with the proper district attorneys information of any violations thereof that may come to its knowledge, in order that suits may be brought to recover the penalties provided for by said act; and that all powers theretofore granted

to the Interstate Commerce Commission shall be extended to it in the execution of the said act;

That on specified dates the Interstate Commerce Commission had made and promulgated the orders, instructions and forms above referred to or recited, and that—

“* * * the purpose of the said Interstate Commerce Commission in making said above recited order and in requiring the reports to be made pursuant to the terms thereof was to enable it to secure from carriers evidence of infractions of the law, in order that suits might thereupon be brought to recover the penalties consequent thereon as prescribed by said act. Even if this were not the purpose of the order, the result would nevertheless be the same, because of the provision of said Act which makes it the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any violation which may come to its knowledge, and the further provision which makes it the duty of such district attorneys to bring suits, upon satisfactory information being lodged with them, to recover the penalties.

“If, therefore, the said order be permitted to stand and your orator be required to make the report called for therein, it will, in the event of any infraction of the act by its officers or agents, be obliged to furnish under oath information of such infraction or violation, and will, consequently, be required not only to disclose actions of its officers or agents which will subject them to the penalties prescribed by the act, but will also subject it to like penalties because of the provision contained in the act that in all prosecutions thereunder the carrier shall be deemed to have had full knowledge of all acts of all its officers and agents.

“The enforcement of said order, therefore, will result in your orator being compelled to furnish evidence which could be used to establish infractions of the said Act, and consequently to subject it to the penalties prescribed, and would, therefore, violate and ignore the rights guaranteed to your orator by the Fourth and Fifth Amendments to the Constitution of the United States.

" * * * that the said order necessarily contemplates and requires that infractions of the law which may occur—and it is inevitable that through oversight, inadvertence, or mistake such infractions will occur—shall be made the subject of report to your orator by the officers concerned in or responsible for such infractions, which said reports will become part of the records of your orator, and as such will be open to the inspection of the said Interstate Commerce Commission. The inevitable and necessary result, therefore, of the enforcement of the said order will be that officers of your orator will be required to report in writing infractions or violations of the law, which said reports will be open to the inspection of the said Commission, whose duty it will be to cause the said reports to be delivered to the United States district attorney empowered to act in the matter, in order that the same may be used by him in securing the conviction of the officer making them, of a violation of the said act, and the consequent infliction upon such officer of the penalties prescribed thereby. The enforcement, therefore, of the said order will have the necessary effect of requiring the officers of your orator to make reports which will be evidence sufficient to convict them of violations of the act, and consequently to subject them to the penalties prescribed therein, a result which is opposed to and violative of the rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

" * * * that neither by the said act of March 4, 1907, above referred to, nor by any other act of the Congress of the United States has the said Interstate Commerce Commission been vested with authority or power to require the making by your orator and other carriers of reports of the character called for, and that as a consequence of such want of power and authority the said order of the Commission is not a lawful order.

"That compliance with the order here complained of would necessarily result in imposing upon your orator new and added burdens both in labor and expense in that the proper making, gathering, tabulating and compiling of the information required to

be set forth in and by the reports required in and by said order will necessitate the employment of a special force of clerks and the organizing them into a special department or bureau for that purpose, and in the event of said order ultimately and in a proceeding arising in ordinary course being declared to be invalid, as it is here asserted by your orator to be, your orator will have been deprived in the above aspect, of property without due process of law; and pending such ultimate determination as to the legality of said order your orator will be subject to the harassments incident to a multiplicity of suits which may be and your orator believes and asserts will be brought against it by the defendant Interstate Commerce Commission or the various district attorneys of the United States having duties to perform in the various judicial districts through which the lines of your orators run and in which it maintains offices and agents, to collect the fines and penalties prescribed in and by said act of March 4, 1907, aforesaid, and the other acts 'to regulate commerce' therein referred:

"Wherefore your orator has not and will not hereafter have, in such regard and connection, any complete, full or adequate remedy at law, by or under which it may have redress for its manifold grievances in such regard."

Complainant's prayers for relief were:

"(1.) That, pending the final determination of the case, an order be made suspending the order of March 3, 1908, of the said Interstate Commerce Commission, and enjoining any proceedings thereunder.

"(2.) That upon the final hearing of the case an order be made setting aside and annulling the said order of the said Interstate Commerce Commission, and perpetually enjoining any action or proceedings thereunder, and that your orator may have such other and further relief in the premises as the nature and circumstances of the case may require.

"(3.) For *subpoena ad respondendum*.

In view of the terms of the stipulation of November 17, 1908, above referred to, the first prayer for relief was not

pressed on the hearing, and the case was submitted as on bill and demurrer for final decree.

Defendant demurred to this bill of complaint, assigning as causes of demurrer, the following:

"That it appears by the complainant's own showing by the said bill that it is not entitled to the relief prayed by said bill against this defendant;

"That said bill prays for relief from the consequences of future violations of the law;

"That said bill prays for relief of employees or officials of complainant corporation not named and not parties to the bill;

"That the complainant corporation is not entitled to the protection of Article V of the amendment to the Constitution of the United States, as prayed for in said bill;

"That the order of the defendant against which relief is sought in complainant's bill is not an unreasonable search or seizure, and is not otherwise a violation of the provisions of Article IV of the amendments to the Constitution of the United States; and

"That the order of the defendant is a lawful exercise of power lawfully conferred."

The case having been fully argued to the court, both orally and on briefs, the learned circuit court, on March 12, 1909, being sufficiently advised of the premises, entered its final decree sustaining defendant's demurrer and dismissing complainant's bill of complaint with costs (R., 16).

Chronology.

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|-----------------|--|
| 1908, August | 21. Bill of Complaint filed in United States Circuit Court for District of Maryland (R., 1). |
| 1908, August | 22. Subpœna was served (R., 8). |
| 1908, September | 28. Defendant filed demurrer (R., 9). |
| 1908, October | 2. Attorney General filed certificate as to general importance of case (R., 11). |

- 1908, October 16. Order of United States Circuit Court for District of Maryland, setting case for hearing before three judges at Richmond, Virginia, November 17, 1908 (R., 11, 12).
- 1908, November 17. Stipulation between Attorney General of the United States and complainant carriers by railroad, and cause argued orally on behalf of parties thereto.
- 1909, March 12. Final decree (without opinion) sustaining defendant's demurrer and directing dismissal of complainant's bill of complaint with costs passed and entered (R., 15).
- 1909, April 7. Complainant's appeal to the Supreme Court of the United States under provisions of Act of Congress of June 29, 1906 (34 Stats. L., p. 584, ch. 3591), with assignments of error, filed and allowed (R., 16).
- 1909, May 14. Perfected appeal with transcript of record filed in the Supreme Court of the United States (R., 19).

ASSIGNMENT OF ERROR.

The Circuit Court of the United States for the District of Maryland erred in sustaining the demurrer interposed by the Interstate Commerce Commission to complainant's bill of complaint and in refusing to extend and grant to the complainant the relief prayed in and by its said bill of complaint.

JURISDICTION.

Section 16 of the Act to Regulate Commerce as amended by the act of March 2, 1889 (25 Stats. L., 855), and act of June 29, 1906 (34 Stats. L., 584), in pertinent part is as follows, viz:

* * * * *

"Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail.

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect."

* * * * *

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and

that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

"From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

"The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of "An act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all

acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney General in every such case to file the certificate provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes."

The jurisdiction neither of this court nor of the court below to grant the relief prayed by the bill has ~~was~~ been questioned by the defendant. The truth of all of the facts sufficiently and properly averred in the bill is admitted by the demurrer. That the facts so averred constitute sufficient ground upon which to invoke the general interposition and aid of a court of equity cannot well be doubted. Apart from the existence of questions of a Federal character sufficient of themselves to authorize the bringing of this suit in a Federal court, section 16 of the act of 1887 "to regulate commerce" expressly provides special authority for its prosecution therein. Upon the case as made out on the pleadings, there is ample jurisdiction in this court to reverse the decree of the Circuit Court and to direct further proceedings to be had in accord with law and justice.

ARGUMENT.

Conceding for the moment and for the purposes of the argument only the constitutionality of this act of March 4, 1907, and so conceding the power of the Congress by apt legislation "to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" we come at once upon the question whether the orders and requirements of the Interstate Commerce Commission, ostensibly made in furtherance and aid of its execution and enforcement, are lawful and capable of enforcement.

It is not claimed on behalf of the Commission that the act itself contains any express grant of power to make such orders or to require from the railroad companies compliance therewith, but an implied grant of such power is sought to be deduced from the terms of section 4 of said act, when read in connection with certain provisions of the act of February 4, 1887, "to regulate commerce" and the acts amendatory thereof.

At the outset it may well be suggested that the act here under consideration, by its express terms, did not take effect or become of force until *one year after its passage*, that is, until the fourth day of March, A. D. 1908. Yet the orders here complained of bear date and were promulgated on the 3d day of March, A. D. 1908. As the power to make such orders, in any event, is to be derived, if at all, solely from the terms of the act of March 4, 1907, itself, and as that act, by its own terms, did not take effect or become of force until the 4th day of March, A. D. 1908, it seems quite plain that the Commission was not endowed on March 3, 1908, with any powers whatever in relation to said act, and particularly was not endowed with power to formulate and promulgate administrative orders in aid of its enforcement.

But lest this objection should be deemed technical and not deserving of too grave consideration, it becomes necessary to examine the "powers granted to the Interstate Commerce Commission" by prior acts of Congress, and to ascertain therefrom whether, by the terms of any of such acts, said Commission has at any time been endowed with the power **asserted and attempted to be exercised** under and by means of the orders referred to in complainant's bill of complaint.

As above stated, this law makes it unlawful for carriers, such as the complainant, to require or permit any employee actually engaged in or connected with the movement of any train to remain on duty for a longer period than sixteen consecutive hours, or, when having been on duty for such period of time, to permit such employee to again go on duty until he has had at least ten consecutive hours off duty, or, when having been on duty for sixteen hours in the aggregate in any twenty-four-hour period, to continue or again go on duty without having had at least eight consecutive hours off duty.

Each and every violation of such prohibition renders the carrier, or any officer or agent thereof causing or permitting the same, "liable to a penalty of not to exceed five hundred dollars," to be recovered in a suit or suits to be brought by the United States district attorney in the proper district court of the United States.

It is made the duty of such a district attorney "to bring such suits upon satisfactory information being lodged with him," and it is made the duty of the Interstate Commerce Commission "to lodge with the proper district attorneys information of any such violations as may come to its knowledge." In all prosecutions under the act the carrier is to be "deemed to have had knowledge of all acts of its officers and agents," but it is further provided and expressly declared "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor

where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen" nor "to the crews of wrecking or relief trains."

The orders of the Commission here drawn in question require all carriers subject to the act to "report within thirty days after the end of each month, under oath, *all* instances where employees subject to said act," viz., all persons actually engaged in or connected with the movement of any train, "have been on duty for a longer period than that provided in and by said act."

In making such monthly reports carriers are required to use and follow certain adopted and prescribed forms and method.

The form of oath originally adopted and prescribed by the Commission required the official of the reporting carrier "to whom hours of service of employees actually engaged in or connected with the movements of trains is reported by its subordinate officers and agents" to take oath that the annexed sheets constituted a full and true report of all hours of service and following periods of rest of employees of said company "who were employed in excess of the statutory period or who had not had the statutory period of rest" during the preceding month, "together with the causes of excess service or lack of rest and the circumstances connected therewith and explanatory thereof."

By its amended or modified order of August 15, 1908, the Commission prescribed new forms of oaths, to be known as oath "A" and oath "B," the former to be used with the appropriate prescribed forms "when there is any excess service to be reported under the headings contained on those forms," and the latter to be used "when there are no forms attached, *there having been no excess service during the month reported.*"

The circular letter of the Commission accompanying and explanatory of said modified order informed interested carriers that "a verified report * * * must be sent to the Interstate Commerce Commission each month, *showing ANY employee on duty in excess of the period, or on duty without the period off duty*" prescribed by the Hours of Service Law, and that "in case no employee has been employed in excess of the time named in said act," "and in case no employee has gone on duty with less than the statutory period off duty, oath 'B,' properly filled out and attested by a notary public (or other public officer clothed with authority to perform his legal functions), will be accepted in lieu of Forms A, B, C, D, and E."

Reports and records of hours of service of employees must "be made to the secretary or similar officer of the reporting common carrier, who shall make the report called for under the order of the Commission of date of March 3, 1908."

It will be noted that notwithstanding the *provisos* in the third section of the act declaring that—

"the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers in charge of such employee at the time said employee left a terminal, and which could not have been foreseen * * * nor to the crews of wrecking or relief trains,"

nevertheless, the orders of the Commission require the carrier through its secretary or similar officer to make a verified report each month "*showing any employee on duty in excess of the period, or on duty without the period off duty, prescribed by the act,*" and the prescribed form of oath requires that the official in question "to whom hours of service of employees actually engaged in or connected with the movement of trains is reported by its subordinate officers and

agents" shall report to the Commission "*all* such hours of service and following periods off duty of the aforesaid employees of said company" (*viz.*, *all* those actually engaged in or connected with the movement of trains), "who were employed in excess of the statutory period or who had not the statutory off duty" during the preceding month, "together with the cause therefor and the circumstances connected therewith and explanatory thereof, and also to report under oath that no employee had either served so-called excess hours or failed to get his prescribed hours off duty, when such was the case." Thus in the exercise of a supposed power claimed to have been granted for purposes incident to the enforcement and execution of the act, the Commission has ordered all carriers subject to the act to render to it detailed monthly reports of *all* service rendered by any of its employees engaged in or connected with the movements of its train in excess of the periods specified in said statute, notwithstanding certain of such train movements are expressly excepted by the terms of the act from its prohibitions; and has also ordered such carriers, even where the law has been fully complied with in every respect in connection with train movements covered by the statute, and where no instances of service in such connection in excess of or contrary to those prescribed by the statute have occurred, nevertheless, to make a report, under oath, within the period limited, to that effect, thus asserting the right and the power to compel the carrier to make reports under oath concerning the hours of service rendered by employees, whether such services were rendered in connection with the movement of trains covered by the prohibitions of the statute or expressly excepted therefrom, and in addition to make such reports when in truth there had been no excess hours of any sort, nor any failure in periods of rest to report.

The requirement as to the making of such reports is not predicated upon the pendency of any complaint before the

Commission, nor even upon the *pendency before the Commission* of any investigation affecting or in any wise related to the hours of service of employees of common carriers, which investigation the Commission of its own motion may have undertaken, but it is based upon the propositions, baldly stated, that under the Act to Regulate Commerce and other acts supplemental thereto the Commission, in the absence of complaint and of any specific matter under investigation, is endowed with the general power—

(a) to inquire into the management of the business of all common carriers subject to the provisions of such acts, and so to keep itself informed as to the manner and method in which such business is conducted;

(b) to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created;

(c) to administer oaths and affirmations;

(d) to require such carriers to file special reports within a specified period and to prescribe the manner of making such reports; and

(e) to require from such carriers specific answers to all questions upon which the Commission may need information. (Brief and Argument for Defendant submitted in U. S. Circuit Court for Maryland.)

As it may be freely conceded that in a *proper case or proceeding pending before it* the Commission “for purposes of this act” (act of February 4, 1887, as amended) has the power under the express provisions of such act—

(1) to require by subpœna the attendance and testimony of witnesses;

(2) the production of all books, papers, tariffs, contracts,

agreements and documents relating to any matter under investigation (sec. 12 of said act) ;

(3) that in such case or proceeding either of the members of the Commission may administer oaths and affirmations and sign subpoenas (sec. 17) ;

(4) that in any such case or proceeding the Commission, "by one or more of the Commissioners, (may) prosecute any inquiry necessary to its duties in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act" (sec. 19) ;

(5) may require annual reports and prescribe the manner in which such reports shall be made ;

(6) may require specific answers to all questions upon which the Commission may need information ;

(7) may require said carriers to file monthly reports of earnings and expenses ;

(8) may prescribe the forms of any and all accounts, records and memorandum to be kept by carriers subject to the provisions of this act, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of money ;

(9) may have at all times access to all accounts, records and memoranda kept by carriers subject to this act, and

(10) may employ special agents or commissioners who shall have authority under the orders of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers (sec. 20) ;

and as no question is involved in the present case with respect to the exercise of any of such powers by or on behalf of the Commission, nor with respect to the exercise or attempt to exercise any powers under the act of August 7, 1888, referred to in the brief on behalf of the defendant as "The Government Aided Railroad Act," nor under the joint resolution of June 30, 1906, likewise referred to as the "Block

Signal Resolution," nor under the act of March 3, 1901, referred to as "The Accident Reports Act," it would seem that no discussion of the incidents or use of any of such powers is called for in the present case and no further reference to any thereof will herein be made, but we will confine ourselves to the discussion of the applicability of the general powers claimed on behalf of the Commission in propositions above lettered *a*, *b*, *c*, *d*, and *e* to the matter in issue under the pleadings before the court, viz., the right and power of the Commission to require carriers subject to the provisions of the Act to Regulate Commerce, as amended, to make monthly reports, under oath, of the hours of service rendered by its employees engaged in or connected with the movement of its trains.

The power to require reports in the manner and form specified in the bill of complaint was asserted by counsel for the Commission in the argument below, under section 4 of the Hours of Service Act taken in connection with sections 12, 17, 20, and 21 of the act of 1887 "to regulate commerce," as amended by acts supplementary thereto. Special stress was also laid by counsel for the Commission upon certain clauses or sentences extracted by him from sections 12 and 20 of said act, while the provisions of sections 17 and 21 of said act are referred to but incidentally.

In order that no misunderstanding or confusion may occur or be caused by the omission to fully set forth every word of each of said sections which may be supposed to have any bearing upon, or demand consideration in the course of, this argument, for purposes of convenient reference, we reprint the same at length here:

"SEC. 12. (As amended March 2, 1889, and February 10, 1891.) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject

to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such

order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition," * * *

* * *
 "SEC. 17. (As amended March 2, 1889.) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

"SEC. 20. (As amended June 29, 1906.) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail" etc., etc.

* * * * *

"Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

"Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this act.

"The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to

inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act."

* * * * *

"SEC. 21. (*As amended March 2, 1889.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission."

It may be conceded by the complainant, but for the purposes of this case only, that so far as applicable to cases or proceedings involving complaints of violations of the Hours of Service Law which may be initiated before it, or to specific investigations which may be instituted by it, *suo motu* or otherwise, in connection with the *execution* (which phrase may be taken to include the *enforcement*) of the provisions of said law, all of the powers specified in the foregoing quotations, to the full extent of their inherent force and virtue,

abode with the Commission at the date of the filing of the bill of complaint herein.

But in the absence of any such complaint, case, proceeding, or investigation, it is denied that any of the above quoted grants of power, either expressly or by necessary implication, confer upon the Commission the right or power to compel the collation, compilation and rendition by the carrier, under oath, of the reports specified in the orders complained of.

In the cases of *Harriman and Kahn* against the Interstate Commerce Commission, 211 U. S., 407, where the powers of the Commission under the above quoted provisions of the law were under discussion, Mr. Justice Holmes, speaking for the majority of the court, said:

"Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid in it recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the Commission, upon which its powers depend.

"Before taking up the words of the statute the **enormous scope** of the power asserted for the Commission should be emphasized and dwelt upon. The legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be

within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By § 12 of the act of 1887, the Commission has authority to require the attendance of witnesses 'from any place in the United States, at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

"How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission v. Brinson*, 154 U. S., 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

"Whatever may be the power of Congress, it did not attempt, in the act of February 4, 1887, c. 104; 24 Stat. 389, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to enforce the regulations which Congress had imposed. The earlier sections of the statute require that charges shall be reasonable, prohibit discrimination and pooling of freights, require the publication of rates, and so forth, in well-known provisions.

Then, by § 11, the Interstate Commerce Commission is created, and by § 12, as amended by later acts, the Commission has 'authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act.' District attorneys to whom the Commission may apply are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and 'for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.' Then comes the provision to which we already have called attention, by which a witness could be summoned from Maine to Texas, and then follow clauses for enforcing obedience to the subpoena by an order of court and for taking depositions, which do not need statement.

"The Commission it will be seen is given power to require the testimony of witnesses 'for the purposes of this act.' The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of opinion on the contrary that the purposes of the act for which the Commission May exact

evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint. As we already have implied the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.

"That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the Commission, 'whenever an investigation shall be made,' to make a report in writing, which was to 'include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and the findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.' As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the Commission was directed to 'investigate' by § 13, or in connection with an inquiry instituted by the Commission, authorized by the same section, 'in the same manner and to the same effect as though complaint had been made.' Obviously such an inquiry is limited to matters that might have been the object of a complaint.

"The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of fact, &c., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the

inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the Commission keeping itself informed, &c. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing 'such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary' (Act of March 2, 1889, c. 382, § 8; 25 Stat., 855, 862).

"It is true that in the latest amendment of § 14, findings of fact are required only in case damages are awarded (Act of June 29, 1906, c. 3591, § 3; 34 Stat., 584, 589). But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If by virtue of § 21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should **not** extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the Commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi judicial duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

"In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that it is thought to sustain the argument for the Commission is § 20, amended by

act of June 29, 1906, c. 3591, § 7 (34 Stat., 584, 593). This authorizes the Commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the Commission may add in certain particulars, and further 'to require from such carriers specific answers to all questions upon which the Commission may need information.' The Commission may require certain other reports, and is to have access to all accounts, records and memoranda. The section now deals at length with this matter and how accounts shall be kept and the like. *It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.*

"All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the Commission may make without that aid but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906, 34 Stat., 823, directing the Commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the Commission the same power it then had to compel the attendance of witnesses in the investigation ordered (34 Stat., 824). The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provisions of § 9 of the act of June 29, 1906, c. 359, § 9, 34 Stat., 595, extending the former acts relating to the attendance of witnesses and the compelling of testimony to "all proceedings and hearings under this act." If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succes-

sion of constitutional doubts, so far as candor permits" (*Knights Templar & Indemnity Co. v. Jarman*, 187 U. S., 197, 205).

In the able dissenting opinion of Mr. Justice Day (concurring in by Mr. Justice Harlan and Mr. Justice McKenna) the arguments relied upon by counsel for the Commission in the case at bar as to its "plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act," are referred to at length, and the cases of *Interstate Commerce Commission v. Brimson*, 154 U. S., 447; *Same v. Cincinnati, etc., Ry. Co.*, 167 U. S., 506, and *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 438, cited in support of such arguments, are specifically analyzed and considered, thus plainly demonstrating that neither the results contended for in and by said arguments on behalf of the Commission, nor the deductions sought to be drawn from the opinions of the court in the cases cited, met with the approval of the majority of the justices.

It is true that the specific question before the court in the Harriman and Kahn cases was the extent of the power vested in the Commission under the 12th, 20th, and 21st sections of the law in question, to compel private individuals, in the furtherance of an investigation initiated by the Commission of its own motion, to answer certain questions propounded to said individuals, and while it might be conceded for the purposes of this argument that certain objections, constitutional or otherwise, ordinarily open to such individuals might not ordinarily be open to carrier corporations similarly circumstanced, nevertheless the true significance of the conclusions reached by the court, is to be gathered from that paragraph of its opinion which reads as follows:

"We are of opinion on the contrary that the purposes of the act for which the Commission may exact

evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulation enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.” * * * “The plain limit to the authority to institute an inquiry given by section 13, and the duty to make a report with findings of fact, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended, that witnesses should be summoned. They equally exclude the inference of broader power from the general words in section 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the Commission keeping itself informed, etc. They equally exclude such inference from section 21, the other section on which most of the reliance is placed.”

It is also true that the court expressly states the matter under consideration to be “the power under the act to regulate commerce and its amendments, to extort evidence from the witness by compulsion,” and disclaims any intention of deciding “what reports or investigations the Commission may make without that aid, but with the help of such returns or special reports as it may require from the carrier.”

But it would seem to be reasonably clear, by parity of reasoning, that what the Commission could not extort under a subpoena it is without power to compel in the absence of subpoena. If in the absence of any pending complaint alleging violation of the law, even though the Commission had

of its own motion instituted a formal investigation in such respect, the Commission could not by the use of its subpoena compel desired disclosures, it would seem *a fortiori* that in the absence of any such investigation or subpoena and in the absence of any express grant by the legislature of power to compel the reports in question, the Commission would be without authority to require by a general order the rendition of reports, under oath, which reports, in the event that their contents tended to disclose violations of the law, might, and undoubtedly would, be used as evidence in judicial proceedings instituted under the terms of the statute and probably would be held to constitute conclusive admissions of the alleged violations on the part of the defendant carrier.

It is begging the question to say that the orders of the Commission do not require information from the individual violating the statute; that such reports may properly be made by the secretary or other similar officer of the corporation, and that to such officials making such reports immunity from prosecution for or on account of such violations, if any, has been freely extended by statute; for the true question first and last is and remains: "Has the Commission legal power by such general orders to compel the rendition by the carrier of such reports?" If not, the requirement so to do is not a "lawful requirement," however convenient to the Commission the results of compliance therewith might prove to be, "but the convenience of commission or court is not the measure of justice" (*Interstate Commerce Commission vs. Stickney*, No. 251, O. T., 1909, decided November 29, 1909).

In the absence of compulsion by subpoena "or lawful requirement of the Commission" immunity would not extend, by the terms of the statute, to any unlucky individual who in due course might find himself under the necessity of reporting a personal infraction of the law.

The objection of the complainant, and of other carriers similarly circumstanced, to the validity of the general orders in question does not depend upon nor presuppose any intention on the part of such carriers to violate the law, the argument of counsel for the Commission to the contrary notwithstanding; nor upon the suggestion of complainant that through oversight, inadvertence, or mistake infractions of the law will occur. It cuts deeper and goes to this extent, viz., that if the business of any particular carrier should be so adjusted as to make an infraction of the statute on its part impossible, thus eliminating all question as to the giving of testimony against one's self, nevertheless, complainant would still be entitled to the relief prayed for, to comply with the unlawful requirement of the Commission, by collecting, compiling, and collating data upon which to base the requisite monthly report to the Commission showing that no violation had occurred, would subject the carrier to increased expense and deprive it of its property without due process of law. The failure or refusal to collect, compile, and collate such data and make such reports will subject it to many harassments and possible suits to which it ought not to be subjected. Any attempt to escape such harassments and suits by complying with the requirements of the order would necessarily entail considerable expenditures of cash which could, and otherwise would no doubt be the better and more properly applied in other directions.

In the light of the varying arguments marking both the majority and dissenting opinions filed in the Harriman and Kahn cases above referred to, we confidently insist that no warrant of law even tending to support the assumption of authority made by the Commission in the present instance is deducible from section 12, 17, 20, or 21, either individually or collectively, of the Act to Regulate Commerce, and that in the exercise of the authority conferred upon this court by section 16 of said act the decree of the lower court

should be reversed and the orders of the Commission should be set aside and annulled.

If the orders here in question were more restricted in scope and were limited solely to requiring reports of all cases of excess hours of service referred to in the bill of complaint and accompanying stipulation involving specific and indicated breaches of the law, the case might assume a different aspect and the principles announced by the Supreme Court in the Harriman and Kahn opinion, *supra*, might not be so broadly applicable, for it seems to be suggested in that opinion, and we see no reason here for opposing the suggestion, that "for the purposes of the act" the Commission, "in connection with a complaint for contraventions of the act" or in connection with an investigation instituted by the Commission "in the same manner and to the same effect as though complaint had been made," might either extort evidence under *subpœna*, from witnesses, or require the giving of information, thus perchance possibly including the making of a "specific report" by the carriers, in respect of "a specific breach of the law." But the orders are not so restricted. They are not even predicated upon any supposed breach of the law, past or future; they expressly command the rendition of reports under oath, in the prescribed form, where no excess hours of service whatever have been rendered by employees. They evidence in the most positive and aggressive form the contention on the part of the Commission—

"that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind."

This contention has been refuted, and the argument that the Act to Regulate Commerce authorizes and requires the Commission to "keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12," in order, among other things, that it may be the better qualified to "recommend additional legislation under § 21," becomes innocuous when tried in the fire of the conclusion reached in the Harriman cases, viz., that in the absence of express legislation declaring otherwise with respect to some particular subject, "the purposes of the act" for which the Commission may legally exact reports or information "embrace only complaints for violations of the act and investigations by the Commission upon matters that might have been made the object of complaint."

It needs but a reading of the act to demonstrate that the power of the Commission to obtain general information by means of reports upon the subject of excess hours of service is not one whit broader than its power to compel the testimony of witnesses in that respect.

Whether Congress is possessed of the power to compel interstate carriers to make and file reports such as are demanded by the Commission, or whether, if possessed of such power, it could delegate it to the Commission, need not be discussed in this case, for it is certain that Congress has not enacted any law expressly bearing upon the subject, and it would seem to be equally certain that it did not attempt, in the Act to Regulate Commerce, including the acts supplemental thereto, to confer upon the Commission the power to compel the making of any such reports, this, for the one good reason, among many others, that prior to the enactment of the Hours of Service Law the making of such reports, or the necessity therefor, had never been officially or formally contemplated.

It may be conceded that by virtue of the provisions of said section 12 the Commission is authorized "to inquire into

the management of the business of all common carriers subject to the provisions of" said act; and is required to "keep itself informed as to the manner and method in which such business is conducted"; and is possessed of the right "to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created." but such concession falls far short of being an admission of the existence of any power, obligation or right on the part of the Commission to compel such carriers at their own expense to collect, collate, compile, and furnish to it such information in the shape of reports under oath or otherwise.

In cases of complaints duly filed, and of investigations formally initiated and pending before it, the Commission may, by *subpœna*, require the attendance of witnesses and compel them to give testimony and to produce all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation. In the absence of any such complaint or investigation the Commission has "at all times" "access to all accounts, records, and memoranda kept by" such carriers, and is authorized to "employ special agents or examiners" "to inspect and examine any and all accounts, records, and memoranda kept by such carriers," and the failure to keep such accounts, records, and memoranda in the manner prescribed by the Commission and to submit the same to the inspection of the Commission, or any of its authorized agents or examiners, is severely penalized. Through the medium of annual reports, the form of which may be prescribed by the Commission, the carriers may be required to answer specifically "all questions upon which the Commission may need information," and to disclose the multitudinous details of their business which are so laboriously itemized in section 20 of the act; and may also be required to file monthly reports or special reports of earnings and expenses within specified periods, but nowhere in the

"act to regulate commerce" or in the acts amendatory thereof or supplemental thereto is there to be found any provision requiring the carriers, on general orders of the Commission, to compile for and furnish to the Commission general information or data such as is described in the orders here in question. It is significant that the act (sec. 20) expressly requires the detailed annual reports to be made under oath, while such requirement is conspicuous by its absence in the provisions of the act relating to other classes of reports.

It seems to us that the orders complained of are not authorized by nor are they in consonance with any of the provisions of the acts relied upon by the Commission to support them, and that they should be declared to be invalid.

Merritt v. Welsh, 104 U. S., 694.

In *Morrill vs. Jones*, 106 U. S., 466, it appeared that a certain section of the Revised Statutes provided among other things that "animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty) upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." The Secretary of the Treasury, by regulation, declared that before a collector of customs could admit any such animals free he must "be satisfied that the animals are of superior stock, adapted to improving the breed in the United States."

Jones imported certain animals, claiming that they should be admitted free as they were "specially imported for breeding purposes." Morrill, the collector, admitting the importation was for breeding purposes, refused to admit it free of duty because he was not satisfied that the animals were of "superior stock." The duties demanded were paid under protest and suit was brought to recover the amount paid.

On writ of error, this court, speaking through Chief Justice ~~White~~, said:

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"The Secretary of the Treasury cannot by his regulation alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. * * * In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a Treasury regulation."

In *United States vs. Eaton*, 144 U. S., 687, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury and acting in supposed accord with section 20 of the act of Congress of August 2, 1886, chapter 840 (24 Statutes, 209), being an act in relation to oleomargarine, required by regulation duly promulgated wholesale dealers in such commodity to keep a record-book in a form prescribed, of their dealings therein, and to "make a monthly return on form 217 showing the oleomargarine received by them and from whom received; also, the oleomargarine disposed of by them and to whom sold or delivered."

Eaton, a wholesale dealer in oleomargarine, refused to keep such a book or to make the prescribed reports, and thereupon he was indicted with a view of subjecting him to the penalties supposed to have been imposed in such case by section 18 of said act, which, among other things, declared that if any dealer in oleomargarine "shall knowingly or wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business * * * he shall pay a penalty of one thousand dollars."

Section 19 of said act provided that all fines, penalties

and forfeitures imposed by this act might be recovered in any court of competent jurisdiction, and section 20 declared that the Commissioner of Internal Revenue might "make all needful regulations for the carrying into effect of this act."

This court, citing Morrill against Jones, *supra*, to the effect that the Secretary of the Treasury could not by his regulation alter or amend a revenue law, said:

"Much more does this principle apply to a case where it is sought substantially to prescribe offenses by the regulation of a Department" (p. 687). * * *

"It would be a very dangerous principle that the thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the Oleomargarine Act for carrying it into effect could be considered as a thing 'required by law' in the carrying on or conducting of the business of oleomargarine in such manner as to become a criminal offense punishable under section 18 of the act; * * *

"If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep accounts and render returns as required by regulation to be made by the Commissioner of Internal Revenue, it would have done so distinctly" (p. 688).

It may well be, as was argued below on behalf of the Commission, that the complainant, being a corporation engaged in interstate commerce, is subject to legislative supervision and regulation and, so far as breaches of positive law are concerned, and in actions brought in that regard, may be denied the protection of the fifth article of the Amendments of the Constitution of the United States. But such argument has little, if any, bearing upon the question presented by the case at bar, for while it may be conceded that the case of *Hale v. Henkle* (201 U. S., 43) goes far in the direction of denying the applicability to corporations of the provision of the fifth article of the Amendments with respect to giving evidence

against itself, it is nevertheless made clear, in the course of the same opinion, that corporations are still at liberty, under the fourth article of the Amendments, to insist upon immunity against *unreasonable* search and seizures, and to refuse at all times to be proceeded against otherwise than by due process of law. As the production of books and papers may constitute an unreasonable search and seizure, within the provisions of the Fourth Amendment, so also may the compelling of a report covering the general course of business of a corporation, either based upon the contents of such books and papers or upon special memoranda, constitute such an unreasonable search. * * *

Whether this be so or not, and conceding *arguendo* that a corporation, even in the absence of any provisions of law for its immunity, may be required by law to produce and submit for inspection in a proper case and upon proper order books and papers made or kept by it in the ordinary course of its business the contents of which may serve as evidence to incriminate it, nevertheless, so far as we are aware, it has not yet been decided in any authoritative case that in the absence of a valid law duly enacted in such regard, that even a corporation may be required by the regulation of an executive or administrative commission to expend its own money or property in the employment of persons to collect, collate, compile, and keep data involving details tending to show either failure or compliance on part of such corporation with the provisions of law, in order that upon such data sworn reports containing either admissions of such failures or proof of such performance, may be made for and submitted to the consideration of such Commission.

Such a course of procedure would no doubt tend greatly to facilitate the labors of the Commission in the execution of the law and would be of great convenience in connection with the performance of its duty of lodging with the proper district attorneys "information of any such violations as may come to its knowledge," but the convenience of the Commission cannot be made the measure of justice.

The Commission has funds and is empowered to appoint inspectors, &c. Why should it not be required to enforce the law and ferret out violations thereof at its own expense and through its own agencies?

As was held in the case of *Boyd v. United States* (116 U. S., 616), "the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the *person, be he individual or corporation, is entitled to protection*" (italics ours), and it might well have been added that the extorting of a report under oath setting forth the tabulated or compiled results of information not ordinarily at hand and only to be found in papers and data which the corporation is required by executive order to keep and compile, is equally as objectionable as the compulsory production of the papers and data itself.

We submit that in an action or even in a series of actions, instituted in the name of the United States to recover penalties under section 3 of the hours of service law, a *subpœna duces tecum* couched in terms as broad as the requirements of the orders of the Commission in this case would be held to be far too sweeping to be regarded as reasonable. Tested by such touchstone, if it should appear that in a proceeding expressly recognized and provided for by the act itself, duly instituted in accordance with established rules of procedure and involving specific breaches of the law, such sweeping disclosures as are here contemplated by the orders of the Commission would neither be encouraged nor tolerated, how is it possible to conclude that in the absence of any express power conferred by any law of Congress, the Commission can of its own motion and in the absence of complaint or investigation as to the existence of any violation of the statute compel the making of the reports in question?

It is not to be forgotten that a corporation is, after all, only a *form* in which rights are exercised. The individuals who co-operate in any enterprise through corporate form are immediately affected by the appropriation of any property of the corporation in the payment of a fine. The technical fact that the *title* is in the corporation does not change the obvious result that the stockholders are the *persons really concerned*—the corporation is the *persona ficta*, and having embarked their property in a joint enterprise, there is no more reason why the records and papers kept in connection therewith should be subject to *unreasonable* searches and seizures than if such property and such records were kept by a copartnership.

The corporation as a fictitious entity may not be able to testify and therefore may not be within the constitutional provision with reference to the giving of testimony, but its property and papers may be unreasonably searched and seized equally with those of an individual, and in the absence of any adequate reason in support of a contrary rule, the protection of the amendment belongs to the group of individuals making up the corporation. This is not lost sight of in the *Hale vs. Henkel* case, 201 U. S., 43, where Mr. Justice Brown says (page 76): "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such bodies. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination (*Gulf, etc., Railroad Company vs. Ellis*, 165 U. S., 150, 154, and cases cited). Corporations are a necessary feature of modern business activity and their aggregated capital has become the source of nearly all great enterprises."

Whether violations of the Hours of Service Law may be prosecuted in civil actions, or whether an action to recover the "penalty of not to exceed \$500.00 for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney," is criminal in character, would seem to be of little consequence in the present connection. The case here does not involve any question of penalty for such violations. In our view there is no penalty prescribed or enforceable for failure on the part of the carriers to collect, and compile the data and to make the requisite reports. If any question of penalty should be assumed to be involved it only arises, if at all, under the provision of section 20 of the act "to regulate commerce" to the effect that—

"If any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual report * * * or shall fail to make specific answer to any question authorized by the provisions of this section, * * * such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses of special reports within a specified period, and if such carrier shall fail to file such reports within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

"Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this act,"

when read in connection with section 16 of the act, which declares that—

"The forfeiture provided for in this act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs."

If, however, the question as to whether the act presenting penalties and the method of their enforcement should be thought to be of consequence, we venture to submit that such provisions must be classified as criminal rather than civil, for, as was said in the case of *Huntingdon v. Attrill*, 146 U. S., 657, 666—

* * * "penal laws strictly and properly are those imposing punishment for an offense committed against the State, and which, by the English and American Constitutions, the executive of the State has the power to pardon." * * * "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. According to the familiar classification of Blackstone 'wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors' (3 Blackstone's Commentaries, p. 2)."

In the case of *Johnson v. Southern Pacific Co.*, 196 U. S., 17, where the so-called Safety Appliance Law, which contained a penalty clause in the following terms, viz:

"That any such common carrier using any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violations shall have been committed;"

was under consideration, Mr. Chief Justice Fuller, speaking for the court, said:

"The primary object of the act was to promote the public welfare by securing the safety of employees and

travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction "

And in *Hepner v. United States*, 213 U. S., 103, 111, it was said, referring to *Boyd v. United States*, 116 U. S., 616, 634,

"it was adjudged that penalties and forfeitures incurred by the commission of offenses against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings for the purposes of the Fourth Amendment of the Constitution and of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.

"So that the *Lee* and *Boyd* cases do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense."

The order complained of in the bill of complaint, in its possible penal aspect at least, is violative of the fundamental principle of Anglo-Saxon criminal procedure, viz., that such procedure shall always be accusatory and never inquisitorial. Under such procedure defendants can only be called upon to answer a definite charge formally preferred against them. Never can they be required, under heavy penalties, to lay charges against themselves, nor, in the absence of complaint or duly conducted investigation, to furnish information upon which others may formulate such charges.

The order now in question requires that a group of individuals coöperating in the *form* of a corporation, engaged in a laudable and highly necessary undertaking, and not complained against or under investigation for any supposed breach of law, shall, possibly, under heavy penalty, at their own expense and peril, make sworn reports of matters which may be either used as the basis of criminal prosecutions to be brought against them, or may serve to disclose in advance of trial any defense which they might be entitled to set up against any of such prosecutions.

It is difficult to find a stronger argument against this order than a simple statement of its seeming purpose and scope.

To sustain it would be to establish a new principle in criminal procedure, as well as to mark a further advance in governmental paternalism—an advance of profound import. The order is unreasonable and tyrannical on its face, and the fact that it may prove a labor-saving device to the Commission can give it no claim to recognition, since it represents a procedure at variance with all the traditions and guaranties of our civilization.

To sum up, the powers claimed for the Commission under *a*, *b*, *d*, and *e* are deducible in law, if at all, from sections 12 and 20 of the Act to Regulate Commerce, and the scope and effect of those sections in such regard have been definitely settled by this court in the *Harriman* case, *supra*. The power claimed under *c*, viz., "to administer oaths and affirmations," would seem to cut but small figure in the present connection, but even that power does not exist in the broad scope claimed for it. As existing, it arises out of the provisions of section 17 of the act of 1887 as amended March 2, 1889, which section has particular reference to the conduct of proceedings and the dispatch of business pending before the Commission and for the keeping of its records and the judicial recognition of its official seal. The section con-

cludes as follows: "Either of the members of the Commission may administer oaths and affirmations and sign subpoenas." Read in the light of its context, it is not straining the accepted rules of statutory construction to say that the power to administer oaths conferred upon the Commissioners is restricted to their administration in "proceedings" pending before the Commission either upon complaint or under investigation. The phrase quoted cannot reasonably be tortured into conferring authority upon the Commission or upon its individual members to *require the making of reports by carriers under oaths administered by others*, such as "a notary public" (or other public officer clothed with authority to perform his legal functions). See "Instructions to be followed in filling up blanks" (*Appendix, post*).

We deem it not inappropriate in concluding this discussion to quote somewhat at length from the opinion of the Supreme Court in the case of *Boyd v. United States*, 116 U. S., 616, wherein Mr. Justice Bradley, quoting from the monumental judgment of Lord Camden in *Entick v. Carrington*, 19 Howell's State Trials, denying the legality under the laws of England, of the practice, then current, of issuing general warrants by the Secretary of State for searching private houses to discover evidence which might be used to convict persons accused of libel, speaks as follows:

(Page 627:)

"After describing the power claimed by the Secretary of State for issuing general search warrants, and the manner in which they were executed, Lord Camden says: 'Such is the power, and therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.'

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances

where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

“Papers are the owner’s goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.’”

* * * * *

(Page 629) :

"Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.'"

* * * * *

And the learned Associate Justice concludes his own discussion of the case before the court in the following soul-stirring and never-to-be-forgotten phrases (page 630) :

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the

case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

"Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures?"

* * * * *

(Page 635:)

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right,

as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

It is respectfully submitted that the order of the Commission here complained of should be held to be invalid and without warrant in law for its support; that the decree of the Circuit Court of the United States for the District of Maryland here complained of should be reversed and the cause remanded to that court with instructions to overrule defendant's demurrer and for further proceedings to be had therein in conformity with law.

JOHN G. JOHNSON,
FREDERIC D. McKENNEY,
Solicitors for Complainant.

HUGH L. BOND, JR.,
Of Counsel.

APPENDIX.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3d day of March, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

IN THE MATTER OF THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES ON RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907.

The method and form of monthly reports of hours of service of employees upon railroads subject to the act of March 4, 1907, having been considered by the Commission:

It is ordered, That all carriers subject to the provision of the act entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, report within thirty days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in said act.

It is further ordered, That the accompanying forms entitled "Interstate Commerce Commission Hours of Service Report," and the method embodied in the instructions therein set forth, be, and the same are hereby, adopted and prescribed; and all common carriers subject to said act are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of April, 1908.

And it is further ordered, That copies of said forms, together with a copy of this order, be served by registered mail upon all common carriers subject to said act.

A true copy.

[SEAL.]

EDW. A. MOSELEY,
Secretary.

The forms referred to were as follows:

INTERSTATE COMMERCE COMMISSION HOURS OF SERVICE
REPORT.

Form of 1908.

..... Report No.
(Month and year.)

HOURS OF SERVICE REPORT
OF THE

.....
(Name of road.)

TO THE
INTERSTATE COMMERCE COMMISSION OF THE
UNITED STATES.

.....
(Name, title, and address of officer sending this report.)
[Act of March 4, 1907.]

OATH.

State of..... }
County of..... } ss:
Town of..... }

....., being duly
sworn, deposes and says that he is the.....
..... of the.....
Rail..... Company, and the official thereof to whom
hours of service of employees actually engaged in or con-
nected with the movement of trains is reported by its subor-
dinate officers and agents; and that annexed hereto, num-

bered ———, is a sheet or sheets constituting a full and true report, according to the best of his knowledge, information, and belief, of all such hours of service and following periods of rest of the aforesaid employees of said company who were employed in excess of the statutory period or who had not the statutory period of rest during the month of ———, 190—, together with the causes of excess service or lack of rest and the circumstances connected therewith and explanatory thereof, in so far as required by the method and forms prescribed by the Interstate Commerce Commission pursuant to the act of Congress entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907.

.....
 Subscribed and sworn to before me this.....
 day of....., 190 .

.....

 INTERSTATE COMMERCE COMMISSION.

EDWARD A. MOSELEY, *Secretary*.

OFFICE OF THE SECRETARY,
 WASHINGTON, August 15, 1908.

.....

 DEAR SIR:

From and after September 1, 1908, all blanks, except "Form A," will cease to be accepted as correct forms on which to make monthly excess service reports, and should be destroyed. In place thereof, this office will furnish (for the present), *upon application*, new forms "B," "C," "D," and "E," together with two new oaths, known as oath "A" and oath "B."

Oath "A" should be used with forms "A," "B," "C," "D," and "E" attached, when there is any excess service to

be reported under the headings contained on those forms. Oath "B" should be used when there are no forms attached, there having been no excess service during the month reported.

You will please note subdivision 4 of the new letter of instructions, which requires the report to be made by the secretary of the reporting common carrier, or by some similar officer.

You will observe that the numbering of the forms and oaths has been discontinued, the name of the month for which the report is made being deemed sufficient.

Very respectfully,

EDW. A. MOSELEY,
Secretary.

INTERSTATE COMMERCE COMMISSION.

HOURS OF SERVICE REPORTS.

(Form of 1908.)

Instructions to be Followed in Filling up the Blanks.

1. A verified report, in accordance with the method and forms prescribed must be sent to the Interstate Commerce Commission each month, showing any employee on duty in excess of the period, or on duty without the period off duty, prescribed by the act entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907. In case no employee has been employed in excess of the time named in said act, and in case no employee has gone on duty with less than the statutory period off duty, oath "B," properly filled out and attested by a notary public (or other public officer clothed with authority to perform his legal functions), will be accepted in lieu of the Forms A, B, C, D, and E.

2. In case of excess service, or of instances where employees have returned to duty in less than the statutory period off duty, the proper form is to be filled out and oath "A" to accompany the sheet or sheets used. To provide for

the retention of duplicates the forms are printed in copying ink.

3. In case one sheet does not afford sufficient space to give the names of all employees, additional sheets should be used of the particular form and these sheets numbered consecutively.

4. Reports and records of hours of service of employees subject to the act entitled "An act to promote the safety of employees and travellers upon railroads by limiting the hours of service of employees thereon," should be made to the secretary or similar officer of the reporting common carrier, who shall make the report called for under the order of the Commission of date of March 3, 1908.

5. These blanks must be fully filled out as to each appropriate column.

6. Each monthly report shall be filed not later than 30 days after the last day of the month to which such report relates.

7. The following abbreviations for occupations may be used: Con. (conductor); engr. (engineer); frmn. (fireman); trn. (trainman—brakeman or flagman); swm. (switchman); opr. (operator); tr. d. (train dispatcher); tow. (towlerman).

For the present such blank forms as are necessary to comply with this order will be furnished upon request.

INTERSTATE COMMERCE COMMISSION HOURS OF SERVICE
REPORT.

Form of 1908.

A.

Report for Month of....., 190
HOURS OF SERVICE REPORT
OF THE

.....
(Name of road.)

TO THE

INTERSTATE COMMISSION COMMISSION OF THE
UNITED STATES.

.....
(Name, title, and address of officer sending this report.)

[Act of March 4, 1907.]

OATH.

State of..... }
County of..... } ss:
Town of..... }

....., being duly sworn,
deposes and says that he is the.....
of the..... Rail..... Com-
pany, and the official thereof to whom hours of service of em-
ployees actually engaged in or connected with the movement
of trains is reported by its subordinate officers and agents;
and that annexed hereto is a sheet or sheets (for sheets not
attached no employees were on duty in excess of statutory
period and no employee resumed duty without having had

the statutory time off duty) constituting a full and true report, according to the best of his knowledge, information, and belief, of all such hours of service and following periods off duty of the aforesaid employees of said company who were employed in excess of the statutory period or who had not the statutory period off duty during the month of, 190 , together with the causes therefor and the circumstances connected therewith and explanatory thereof, in so far as required by the method and forms prescribed by the Interstate Commerce Commission pursuant to the Act of Congress entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907.

.....
 Subscribed and sworn to before me this.....day
 of....., 190

.....

**INTERSTATE COMMERCE COMMISSION HOURS OF SERVICE
 REPORT.**

Form of 1908.

—
 B.

Report for Month of, 190

Form of Oath to be used when there are no instances of
 EXCESS SERVICE to be reported.

HOURS OF SERVICE REPORT

OF THE

.....
 (Name of road.)

TO THE
INTERSTATE COMMERCE COMMISSION OF THE
UNITED STATES.

.....
(Name, title, and address of officer sending this report.)

[Act of March 4, 1907.]

OATH.

State of }
County of } ss:
Town of }

....., being duly sworn, deposes and says that he is the..... of the Rail..... Company, and the official thereof to whom hours of service of employees actually engaged in or connected with the movement of trains is reported by its subordinate officers and agents; and that, according to his best knowledge, information, and belief, no instances of excess service were rendered by any employee actually engaged in or connected with the movement of trains, operated by the Rail..... named above, nor were there any employees who resumed duty without having had the statutory time off duty, during the month of 190 , which are required to be reported by the method and forms prescribed by the Interstate Commerce Commission pursuant to the Act of Congress entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907.

.....
Subscribed and sworn to before me this day of 190-.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 222.

**THE BALTIMORE & OHIO RAILROAD
COMPANY, APPELLANT,**

v.s.

INTERSTATE COMMERCE COMMISSION.

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.**

POINTS ON ORAL ARGUMENT.

We think the act of March 4, 1907, "to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" (34 Stats. L., 1415, ch. 2939) is invalid,

1. Because, although addressed to and aimed at common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and the penalties prescribed for the in-

fraction thereof are not confined wholly and solely to interstate commerce.

The prohibitions of the act extend to each and every carrier by railroad who does any interstate business and embrace every employee of any such carrier "actually engaged in or connected with the movement of ANY train," without qualification.

They concern the purely local branch lying and operated wholly within a single State, and the employees confined thereto equally with the trunk line and its operatives.

They include—

Round or engine house employees.

Local switching crews.

Platform men and car inspectors located at stations and terminals.

Station masters and their assistants, and

Telegraphers handling purely local messages having to do with the movements of trains on branch or purely local lines.

The act presumes to regulate the carrier because it engages in interstate business and does not pretend to confine itself to regulating such interstate business itself.

While embracing subjects within the constitutional power of the Congress, it also embraces subjects not included therein and both are so commingled as to be incapable of practical and workable separation.

Taken even in its most restricted sense the act cannot be said to solely apply to and regulate interstate commerce, nor does it lie within any true definition of that authority express or implied "to use all means appropriate to the exercise of the power conferred by the Constitution in such regard."

The law is invalid because unconstitutional.

The Employers' Liability Cases, 207 U. S., 463.

2. The statute is highly penal (sec. 3. It is likewise uncertain and indefinite. It differentiates cases of "emergency" (sec. 2) from cases of "casualty," "unavoidable accident," "act of God," and "delay" for causes unknown to carrier at time employee left a terminal and which could not have been foreseen.

It authorizes the requiring or permitting of employees working excess hours in cases of "emergency," but does not define what circumstances shall or may constitute an emergency within its purview.

The legislature, to obtain the co-operation of the judiciary in enforcing the laws, is bound to enact workable measures. The courts should not venture upon the "enticing field" of judicial legislation, in order to supply the omissions or remedy the defects of the legislature.

Should the legislature omit to furnish a plain and definite standard by which to gauge the par-

ticular act which may be denounced as a crime or which may subject a luckless carrier to penalties, the act should, in all conscience and by strict law, be held too uncertain to be valid.

In *United States vs. Reese*, 92 U. S., 220, where the sole question before this court was as to the validity of the act of Congress of May 31, 1870, enacted to bring into play and give effect to the provisions of the Fifteenth Amendment by subjecting to punishment inspectors of elections who refused to receive and count votes of qualified electors, this court, affirming the judgment of the lower court, which had stricken down both the statute and the indictment laid under it, speaking by its then Chief Justice, said:

“Nothing should be left to construction if it can be avoided. The law ought not to be in such condition that the elector may act upon one idea of its meaning and the inspector upon another.” * * *

“Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by honest error in the construction of a penal statute, he may be subjected to a prosecution.” * * *

“Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind.” * * *

“Every man should be able to know with

certainty when he is committing a crime.”

* * *

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government.”

Being face to face with the question as to “whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish,” the court declined to so limit the law, saying that so to do “would be to make a new law, not to enforce an old one.”

See also—

Cook vs. State, 26 Ind. App., 278.

Louisville & N. R. R. vs. Kentucky, 99 Kentucky, 132.

Tozer vs. United States, 52 Fed. Rep., 917.

3. The statute attempts to deprive the carriers of property and to invade their liberty without due process of law contrary to the provisions of the Fifth Amendment.

Adair vs. United States, 208 U. S., 161.

4. We think the orders of the Interstate Commerce Commission here complained of are invalid because among other things they exceed the powers conferred by the statute itself in that they compel the carrier to report every case of excess hours served by *any* employee engaged in or connected with the movement of *any* train, notwithstanding the law itself expressly declares that its provisions thus including its prohibitions shall not apply in cases of "casualty," "unavoidable accident," "act of God," nor to crews of wrecking or relief trains.

The orders compel reports under oath as to excess hours served by any employees engaged in or connected with the movement of purely local as well of interstate trains, and also when there has been no such excess hours served.

Merritt *vs.* Welsh, 104 U. S., 694.

Morrill *vs.* Jones, 106 U. S., 466.

United States *vs.* Eaton, 144 U. S., 687.

If the orders were invalid when promulgated they have not become valid by virtue of the amendments of June 18, 1910, to section 20 of the act to Regulate Commerce (36 Stats. L., 556), for such amendments, but authorize the Commission to require reports under oath concerning matters about which the Commission is required by law to inquire or keep itself informed or which it is required to enforce, and it is plain that the Commission has no function to perform and nothing to

enforce in cases of casualty, accident, act of God, or with respect to the members of crews of wrecking or relief trains, for all of these, in express terms, are excluded from the application of the statute.

Reference is made to contents of main and reply brief for additional points urged in the oral argument and the authorities cited in support thereof.

JOHN G. JOHNSON,
FREDERIC D. McKENNEY,
For Appellant.

HUGH L. BOND, JR.,
Of Counsel.